

William J. Crowley, WSBA No. 18499
will@crowleylawoffices.com
CROWLEY LAW OFFICES, P.S.
600 University Street Suite 1901
Seattle, WA 98101
Tel. (206) 224-7069
Fax: (206) 624-8785

F. Christopher Austin
Pro Hac Vice (Nevada Bar No. 6559)
caustin@weidemiller.com
WEIDE & MILLER, LTD.
10655 Park Run Drive, Suite 100
Las Vegas, NV 89144
Tel: (702) 382-4804
Fax: (702) 382-4805

Amanda L. Bruss
Pro Hac Vice (California Bar No. 246249)
amanda@brusslegal.com
BRUSS LEGAL PLLC
7550 E. 53rd Place #172464
Denver, CO 80217
Tel. (415) 271-5754

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD E. MORISKY, an individual,

Plaintiff,

v.

MMAS RESEARCH, LLC, a Washington limited liability company, et al.,

Defendants.

Case No. 2:21-cv-01301 RSM-DWC

PLAINTIFF'S MEMORANDUM OF FEES AND COSTS (DKT. 123)

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Pursuant to this Court’s Order on Motions to Compel (the “Order”)¹ granting Plaintiff’s Motion to Compel and for Sanctions and Plaintiff’s request to compel production of documents,² and Fed. R. Civ. P. 37(a)(5), Plaintiff, Dr. Donald E. Morisky (“Dr. Morisky”) hereby files this Memorandum of Fees and Costs with its supporting declarations and exhibits in support of the Court’s Order granting Plaintiff’s request for reasonable fees and costs incurred in connection with the Defendants’ failure to appear at properly noticed depositions on February 23 and 24, 2023, respond to interrogatories, produce documents, and Plaintiff’s motions to compel the same and for sanctions.

I. RELEVANT LAW

Pursuant to the Order and Rule 37(a)(5), the court “must” award all of Plaintiff’s reasonable expenses, including attorney’s fees incurred in connection with “the conduct necessity[ating] the motion.”³ To determine the amount of a reasonable fee, courts in the Ninth Circuit first apply the “lodestar” method and then may adjust the lodestar “upward or downward based on a variety of factors.”⁴ “The lodestar method multiplies the number of hours ‘the prevailing party reasonably expended on the litigation by a reasonable hourly rate.’”⁵

The party seeking fees may justify the hours claimed by submitting detailed records or declarations attesting to the same.⁶ The setting of a reasonable hourly rate is calculated according to prevailing market rates.⁷ This Court has held that hourly rates ranging from \$300 per hour for associates to \$545 per hour for the most senior litigators are “in line with

¹ Dkt. 123.

² Dkt. 111-112, 120.

³ *Id.*; Fed. R. Civ. P. 37(a)(5).

⁴ *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013) (citations omitted).

⁵ *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006) (quoting *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995)).

⁶ *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945-46 (9th Cir. 2007).

⁷ *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

the prevailing market rates in this district.”⁸ District courts may adjust the amount awarded for attorney fees by a “variety of factors.”⁹ According to the Supreme Court, the most critical factor in determining the reasonableness of an award is “the degree of success obtained.”¹⁰

II. REQUESTED FEES AND COSTS ARE REASONABLE

As Plaintiff wholly succeeded in its motions to compel Defendants’ depositions and discovery responses,¹¹ Plaintiff seeks and should be granted a lodestar award of \$47,876.50 in attorney’s fees and a cost award of \$2,559.69, for a total award of \$50,436.19. The reasonableness of the amounts requested is supported by the Billing and Cost Statement, attached hereto as Exhibit 1, the documentation of incurred expenses, attached hereto as Exhibit 2, and the declarations of Plaintiff’s counsel, F. Christopher Austin and Amanda Bruss, filed concurrently herewith.

The billing rates of counsel and paralegal support set forth in the Billing and Cost Statement are reasonable. This is a federal copyright and trademark infringement action, requiring expertise in complex areas of federal intellectual property law, and both counsel for Plaintiff have decades of relevant experience and technical knowledge in copyright, trademark and related intellectual property litigation.¹² Mr. Austin has over 27 years of litigation experience with 23 of those years focused nearly exclusively on intellectual property matters.¹³ He is the “most senior litigator” and heads the practice in his firm, Weide & Miller, Ltd., a Tier 1 national intellectual property law boutique, and he was senior intellectual property litigation counsel for the Las Vegas office of his prior firm, Greenberg Traurig,

⁸ Order on Motion for Attorney Fees and Costs (Dkt. 92), *Roque v. Seattle Housing Authority*, Case 2:20-cv-00658-JRC (filed Sep. 28, 2021).

⁹ *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008).

¹⁰ *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

¹¹ *See*, Dkt. 123.

¹² *See generally*, Declaration of F. Christopher Austin in Support Memorandum of Fees and Costs (“Austin Decl.”), filed concurrently; *see also* Declaration of Amanda Bruss in Support of Memorandum of Fees and Costs (“Bruss Decl.”), filed concurrently.

¹³ Austin Decl., at ¶2-5.

1 LLP.¹⁴ Prior to her association with Weide & Miller in this matter, Ms. Bruss was a partner
 2 at Harmon, Seidman & Bruss, LLC, a national copyright infringement litigation boutique,
 3 where she was senior litigation counsel for copyright infringement actions and related
 4 matters.¹⁵ Accordingly, the \$485 hourly rate for Mr. Austin and the \$325 rate for Ms. Bruss
 5 are both reasonable and “in line with the prevailing market rates in this district.”¹⁶ The \$300
 6 rate for William Crowley (Washington counsel) and the \$140 rate for Brianna Show
 7 (intellectual property paralegal) are also well within prevailing market rates for this type of
 8 matter.¹⁷

9 Finally, the reasonableness of the requested fees and costs is further supported by Mr.
 10 Austin’s repeated offers to take these depositions remotely to avoid either party from having
 11 to incur the time and expense of travelling to and lodging in Seattle for two days to conduct
 12 them. Defendants’ refusal to permit these depositions to be taken remotely has now been
 13 proven to be a pretext specifically designed to cause Plaintiff to incur the fees and costs that
 14 are the subject of this requested award. Mr. Trubow repeatedly alleged that he could not be
 15 deposed remotely because he was aged and hard of hearing.¹⁸ That this excuse was a pretext
 16 is revealed by Mr. Trubow’s request that the compelled depositions now set to be taken at Mr.
 17 Austin’s offices in Las Vegas be taken remotely, presumably so he can avoid the
 18 inconvenience, time and costs of travel he caused Plaintiff to incur.¹⁹

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21 ¹⁴ *Id.*

22 ¹⁵ Bruss Decl., at ¶1-4.

23 ¹⁶ *See*, Order on Motion for Attorney Fees and Costs (Dkt. 92), *Roque v. Seattle Housing*
Authority, Case 2:20-cv-00658-JRC (filed Sep. 28, 2021).

24 ¹⁷ Austin Decl., at ¶9-10.

25 ¹⁸ *See*, Dkt. 112-4 at 7 (Jan. 5, 2023, Email from Trubow’s counsel: “Mr. Trubow, at age 72,
 has a hearing disability and thus cannot effectively use Zoom”).

26 ¹⁹ *See* Austin Decl. at 12; *see also*, May 3, 2023, email chain (attached hereto as Exhibit 3,
 27 in which Patricia Ray, Defense Counsel, represents Trubow is now requesting to be
 28 deposed remotely.

Accordingly, Defendants should not be heard to complain regarding the costs and fees associated with requiring Plaintiff's counsel to travel to Seattle and remain there for the two days the depositions were noticed. As a result of Defendants' pretextual efforts to cause Plaintiff to incur fees and costs, Mr. Austin was required to travel to and remain in Seattle for two full days and was unable to return to Las Vegas earlier or work on other matters to mitigate costs or fees.²⁰ Accordingly, Defendants should reasonably be required to cover all such fees caused by their own unreasonable and sanctionable behavior.

III. CONCLUSION

For the foregoing reasons and as supported by the Declarations of counsel and supporting records, Plaintiff requests the Court order Defendants jointly and severally to reimburse Plaintiff \$47,876.50 in attorney's fees and \$2,559.69 in costs for a total award of \$50,436.19\$ and that Defendants be required to remit the total amount awarded to Plaintiff care of Plaintiff's counsel, Weide & Miller, Ltd., within 10 days of the issuance of the order directing the same.

DATED: May 11, 2023.

/s/ William J. Crowley
William J. Crowley
CROWLEY LAW OFFICES, P.S.
600 University Street, Suite 1901
Seattle, WA 98101

F. Christopher Austin
WEIDE & MILLER, LTD.
10655 Park Run Drive, Suite 100
Las Vegas, NV 89144

Amanda L. Bruss
BRUSS LEGAL PLLC
7550 E. 53rd Place #172464
Denver, CO 80217

²⁰ Austin Decl. at ¶12. As noted in Mr. Austin's Declaration, he had attempted to secure an earlier flight on the second day after Defendants failed to appear, but not surprisingly, no earlier flights to Las Vegas on that Friday—the busiest day of the week for incoming flights to Las Vegas—were available.

/s/ William J. Crowley
William J. Crowley
CROWLEY LAW OFFICES, P.S.
600 University Street, Suite 1901
Seattle, WA 98101
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2023, I caused a true and correct copy of the foregoing to be filed via the cm/ecf system, which will serve a notice of electronic filing to all counsel of record.

/s/ William J. Crowley

William J. Crowley

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